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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 725

NORTHWESTERN OIL COMPANY, A CORPORATION,
Petitioner,

vs.

SOCONY-VACUUM OIL COMPANY, INC., ET AL.,
Respondents.

BRIEF OF RESPONDENTS, SOCONY-VACUUM OIL COMPANY, INC., CONTINENTAL OIL COMPANY, THE PURE OIL COMPANY, SHELL OIL COMPANY, INC., SINCLAIR REFINING COMPANY, MID-CONTINENT PETROLEUM CORPORATION AND PHILLIPS PETROLEUM COMPANY, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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BRIEF OF RESPONDENTS, SOCONY-VACUUM OIL COMPANY, INC., CONTINENTAL OIL COMPANY, THE PURE OIL COMPANY, SHELL OIL COMPANY, INC., SINCLAIR REFINING COMPANY, MID-CONTINENT PETROLEUM CORPORATION AND PHILLIPS PETROLEUM COMPANY, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

The opinion of the Circuit Court of Appeals appears on pages 1353 to 1358 of the record and is reported in 138 F. (2d) 967 (Dec. 7, 1943).

JURISDICTION.

Petitioner asserts that the jurisdiction of this Court is invoked on the ground that the case is based upon an alleged violation of the Sherman and Clayton Antitrust Acts. Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. A. §1; Act of October 15, 1914, 38 Stat. 730, 15 U. S. C. A. § 15. (Petition for Writ of Certiorari, p. 2.)

STATEMENT OF THE CASE.

1. The Proceedings in the Trial Court and the Circuit Court of Appeals.

This action was brought by petitioner, Northwestern Oil Company, to recover treble the damages alleged to have been sustained by it as a result of the conspiracy for which the respondents were convicted in *United States* v. *Socony-Vacuum Oil Co., Inc., et al.*, 310 U. S. 150 (1940) (Madison Oil Case).

Petitioner alleges in its complaint that it is a jobber engaged in the business of purchasing and selling gasoline (R. 5-6). Petitioner further alleges that as a result of the conspiracy charged in the Madison Oil Case, there was an increase in the tank car price of gasoline resulting in petitioner paying a higher price for gasoline purchased by it, and that it did not pass on the amount of this increase to its customers (R. 6-9, 28-29).

Respondents denied that petitioner sustained any damage, and alleged as a special defense that petitioner was in *pari delicto* with them and had knowingly combined with them and others to raise retail prices in certain parts of the Middle West, which was the purpose of the conspiracy charged in the Madison Oil Case (R. 39-41).

During the trial of the case, petitioner dismissed any claim for damages on gasoline consumed and not resold by it, and sought to maintain this action for damages solely on gasoline bought and resold (R. 1313).

At the conclusion of petitioner's case in the trial court, respondents moved for a directed verdict on two grounds: (1) there was no evidence that petitioner had been injured

in its business or property; and (2) the undisputed evidence established that petitioner participated in the conspiracy and was in *pari delicto* with respondents (R. 1313-1315). The trial court sustained respondents' motion upon the first ground and found it unnecessary to pass upon the second ground (R. 987).

The Circuit Court of Appeals affirmed the judgment of the trial court upon both grounds (R. 1357-1358). The Circuit Court of Appeals made the following findings of fact:

> (1) Plaintiff wholly failed to prove any loss to its property or business, and as the increases in plaintiff's buying price were followed by corresponding increases in its selling price, the only reasonable inference from the record is that plaintiff sustained no loss (R. 1354, 1357).
>
> (2) The proof discloses that in the meetings and conferences, as a result of which stabilization of prices came about, plaintiff's officers participated and cooperated and were well advised that the program was intended to establish an increased tank car quotation in order to maintain retail prices in plaintiff's territory; and that the letters and testimony of plaintiff's officers clearly established that plaintiff was an active agency in working out with defendants and others the scheme of which it now complains and in raising and maintaining prices (R. 1355).

The Court announced two propositions of law:

> (1) "The Clayton Act does not permit recovery by plaintiff in causes such as this for unlawful prices as such but authorizes recovery only of pecuniary loss to property or business." (R. 1357.)
>
> (2) "Where parties stand in *pari delicto*, the law leaves them where it finds them." (R. 1358.)

The finding of fact and holding of the Circuit Court of Appeals on *pari delicto* are not brought forward by any question in the Petition for Writ of Certiorari.

2. The Facts.

(a) The Facts Relating to Petitioner's Claim of Injury.

Petitioner is a jobber, buying gasoline and reselling it to other jobbers, retail dealers and consumers (R. 223, 369). Petitioner did not buy any gasoline from respondents, but purchased from a large jobber, W. H. Barber Company, who in turn bought from the refiner, Tide Water Oil Company (R. 400-403).

The facts establish that petitioner's buying price and likewise its selling price to other jobbers, dealers and consumers were all based upon the tank car spot market.

The W. H. Barber Company bought from Tide Water at ¼c per gallon below the published tank car market (Ex. 15, R. 243, 559; Ex. 146, R. 508, 510), and resold to petitioner at the low of this market with certain credits (R. 400-403, 223; Ex. 15, R. 243, 559). Petitioner was assured a margin by Barber of 5¼c and subsequently 5⅜c per gallon between the tank car price plus freight and the service station price established from time to time by Standard Oil Company of Indiana (Ex. 15, R. 243, 560, 563-564). Petitioner resold gasoline in tank cars to other jobbers at the average of the high and low quotations of the same tank car spot market upon which it purchased (R. 369; Ex. 13, R. 242, 1051). It resold to dealers at tank wagon prices, which until August 1936 were determined by deducting a fixed discount from established service station prices (R. 250-251, 303-304). It resold to consumers at service station prices or at the consumers' tank wagon price (R. 250). Petitioner's selling price did not vary with each sale as a result of bargaining between seller and buyer. The price at which petitioner sold to consumers and dealers was determined at all times by the posted prices of the market leader, Standard Oil Company of Indiana, as it was cus-

tomary for petitioner and other jobbers to follow the posted prices of this market leader (R. 252-253, 571). In 1935 and 1936 Standard's service station and tank wagon prices followed the increases and decreases in the tank car market as they were based on that market. Commencing on September 11, 1934 and continuing during 1935 and 1936, Standard's formula for determining its retail price was: tank car price, plus freight, plus taxes, and plus 5½¢ per gallon (R. 160-161, 203-204, 214). This formula was adopted by the Department of Agriculture and Markets of Wisconsin in Order 23C, which fixed the minimum service station price in Wisconsin during the period between February and June 1935 (Ex. 61, R. 380, 382-384).

The facts sustain the finding of the Circuit Court of Appeals that petitioner sustained no pecuniary loss in business or property. The increases in the tank car market complained of by petitioner, commenced early in 1935, and by June 1935 the tank car market had increased 1.25¢. During this period, petitioner's sales price to dealers and consumers had increased 1.3¢. There were no further changes in either petitioner's buying or selling prices in the remainder of 1935. In January 1936, petitioner's buying price increased .5¢ and its selling price increased .5¢. There were decreases in petitioner's buying price in 1936 of .625¢ and there were decreases in its selling price of .6¢. In October and November 1936, petitioner's buying price increased .25¢, and in December its selling price increased .3¢. Since the tank car market moves in eighths and the service station and tank wagon markets move in tenths, there were times when the buying or selling price of petitioner had increased slightly more than the other, but on December 31, 1936, the net increase in the *selling* price was .059¢ more than the net increase in the buying price (R. 329-336; Exs. 155, 156, R. 667, 1270-1273; Ex. 25, R. 376, 1070).

The fact that an increase in the tank car market would result directly in an increase in the retail market was the basic principle of the Madison Oil Case.[1]

In the present case petitioner offered in evidence a computation purporting to show the amount it paid for gasoline in 1935 and 1936, as compared with the amount it would have paid at the tank car price in effect on February 19, 1935 (Ex. 165, R. 913, 1301). Petitioner did not offer any computation of its increased income resulting from increases in its selling price during those years, nor did petitioner prove the amount of gasoline sold by it during those years or during any price period.

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1. The indictment in the Madison Oil Case charged that an increase in tank car prices will result directly in an increase in retail prices of gasoline and that defendants intentionally increased the tank car price of gasoline and in turn intentionally raised the general level of retail prices prevailing in the Midwestern area (including the Western District of Wisconsin) (Ex. 1, R. 110, 1000-1001). The trial court, in its charge to the jury in that case, instructed them to return a verdict of "not guilty" unless they found that the defendants had intentionally raised the tank car price of gasoline "and in turn have intentionally raised the general level of retail prices prevailing in said Mid-Western area, including the Western District of Wisconsin" (Ex. 1-A, R. 834, 1028).

See opening statements and closing arguments of Government counsel in Madison Oil Case (R. 103, 105-106, 2309 in *United States* v. *Socony-Vacuum Oil Co., Inc., et al.*, Nos. 346 and 347, 310 U. S. 150 (1940)), and opinion of the Supreme Court in *United States* v. *Socony-Vacuum Oil Co., Inc., et al.*, 310 U. S. 150, 190-192, 198-200 (1940).

For the purpose of determining the extent of the judgment in the Madison Oil Case as *prima facie* evidence in this case, the court may examine the proceedings in that case, *State of Oklahoma* v. *State of Texas*, 256 U. S. 70, 88 (1921); and a court may take judicial notice of its records, *United States* v. *Pink*, 315 U. S. 203 (1942).

(b) **Price Stabilization Activities of Petitioner and Respondents.**

In 1934 all prices in the petroleum industry were demoralized as a result of the economic depression and the unlawful production of crude oil from the largest field in the world, the East Texas Oil Field (R. 122-129). The sale of both hot and distress gasoline was bringing about price wars in the tank car market, and many retailers were buying this cheap gasoline and were cutting the retail market, which was resulting in price wars in that market (R. 123, 128-129). In order to solve these problems, Harold L. Ickes, the Petroleum Administrator, wrote a letter to C. E. Arnott (the principal individual defendant in the Madison Oil Case) directing him to take action to restore markets to normal conditions (Ex. 4, R. 162, 163). Pursuant to this letter, Arnott appointed a General Stabilization Committee, which in turn brought about the appointment of various state and county price stabilization committees in the Middle West. All of the different units in the marketing branch of the industry were represented on these committees, namely, major oil companies, jobbers, dealers and others (R. 134). In December, 1934, there was a meeting of the General Stabilization Committee in Chicago, which was attended by representatives of the major oil companies, jobbers, dealers and other marketers. At this meeting, it was agreed to raise many subnormal markets to normal in the Middle West, and this agreement was made effective by state price stabilization committees, state jobbers' associations and other (R. 137-139). At a subsequent meeting in Chicago in January, 1935, of this same General Stabilization Committee, Arnott stated that there could not be stabilization in the retail market without having a firm tank car market, and he appointed a subcommittee, known as the Tank Car Stabilization Committee, to study the problem of the tank car

market and to work out a plan that would enable the independent refiner to make a profit and that would support a normal retail price structure (R. 140-143). This Tank Car Committee developed the buying program complained of by petitioner in the present case (R. 144-149); and this Committee made reports of its activities from time to time to the parent committee, the General Stabilization Committee (R. 154-155). The Tank Car Committee met monthly until February, 1936, and at this last meeting it was discontinued (R. 148, 150).

Petitioner was an active participant in the stabilization plan of the General Stabilization Committee and knew of the existence of the buying programs of 1935. Petitioner knew that it was essential to stabilize the tank car market in order to maintain normal retail prices in its territory (R. 408-409, 442-444, 446). Its Vice President and General Manager, A. F. Podvin, complained to the Petroleum Administrative Board in Washington of the tank car market bringing about a demoralized condition in the retail market (Ex. 83, R. 438, 445). Margold of the Petroleum Administrative Board replied to Podvin and stated that they realized that it was essential to eliminate the distress gasoline in order to achieve any degree of stabilization (Ex. 84, R. 438, 446). After the appointment of the various stabilization committees by Arnott in the summer of 1934, Podvin requested petitioner's employees to cooperate with these committees (Ex. 68, R. 414, 415). He knew of the Chicago meeting of the General Stabilization Committee in December, 1934; he knew that Arnott had recommended the restoration of subnormal prices in petitioner's marketing territory in Minnesota; and he worked and combined with respondents and others to carry out the agreement reached at this Chicago meeting (R. 452-464). Podvin testified that he and other representatives of petitioner attended stabilization meetings in 1934, 1935

and 1936; that agreements were made at some of these meetings to restore subnormal prices to normal; and that there were representatives of the major oil companies, jobbers and others at these meetings (R. 463, 488-490). Podvin testified that he knew that the Minnesota and Wisconsin stabilization committees, with which he was working, were functioning under the General Stabilization Committee headed by Mr. Arnott (R. 457). Petitioner's President, H. M. McKenzie, testified that he learned of the buying programs shortly after March, 1935, and that he talked with other officers of the petitioner about these programs (R. 492-493). The letters written by Podvin, as well as his testimony, establish that petitioner, with full knowledge of the scope of the stabilization program, was active in working with respondents and others in raising prices both before and after the NRA was invalidated by the Supreme Court (R. 472-489).

3. Factual Errors in Petitioner's Brief.

There are many purported statements of fact in Petitioner's Brief without supporting record references; many of these are misstatements. We call attention to the following:

(1) On Page 21 petitioner states that "The District Court * * * did intimate that there was no proof of *pari delicto*. * * *" On the contrary the District Court said: "While there may be evidence to sustain a finding that the plaintiffs were active participants in the stabilization plan, I don't think that it is necessary for the Court to pass upon that portion of the motion at this time, * * *" (R. 987).

(2) Petitioner makes several references to the fact that it consumed about 2% of the gasoline purchased by it (Pet's. Brief, pp. 7, 13). Petitioner fails to call attention to the fact that during the trial it dismissed any claim for damages on gasoline consumed or not resold by it (R. 1313).

(3) Petitioner sets out a schedule of margins in the appendix to its brief and refers to them as if they were the margins of petitioner. The exhibit showing these margins for 1934 was excluded by the trial court (R. 669), and the exhibits showing these margins for 1935 and 1936 were ordered corrected so that the jury would not be confused into believing that they were petitioner's margins (R. 496-497, 667-672). Petitioner received larger margins (R. 337-339).

(4) On Page 22 petitioner states:

> "Podvin's activities with reference to restoring prices in areas where price wars existed, were discontinued upon becoming suspicious that Respondents were rigging the market. * * *
>
> "If it be said that Podvin took part in the conspiracy which raised prices, he did so innocently. * * *"

Podvin testified that he took an active part in stabilization activities in 1934, 1935 and 1936 (R. 463, 488-489). With reference to his innocence, he concluded a letter in August, 1935 in regard to raising prices with this statement:

> "Since the cancellation of the N. R. A. we are not supposed to talk prices or come to any agreement between one another on prices, therefore, I am not making a copy of this letter and will ask you to kindly destroy same after reading it so it will not get into your files" (Ex. 103, R. 474, 478).

Since this is an appeal from a judgment sustaining respondents' motion for a directed verdict at the conclusion of petitioner's case, respondents must accept the facts shown by the record for the purposes of this appeal.

SUMMARY OF ARGUMENT.

I.

The Petition for Writ of Certiorari does not bring forward any question relating to the holding of the Circuit Court of Appeals that petitioner was in *pari delicto* with respondents. The Court held that this was a sufficient ground to support the directed verdict for respondents. As this question is not brought forward, it is not before this Court (*Rule 38, Supreme Court Rules*) and this Court, in any event, would have to affirm the judgment of the Circuit Court of Appeals. The Supreme Court will not take jurisdiction to decide moot questions, or when it appears that the decision of the lower court will have to be affirmed regardless of how this Court resolves the questions raised by the petition. *The Prudence Co., Inc.* v. *Fidelity & Deposit Company of Maryland, et al.*, 297 U. S. 198, 208 (1936); *Lynch, et al.* v. *New York ex rel. Pierson*, 293 U. S. 52, 54, 55 (1934); *Richardson* v. *McChesney, Secretary of State of the Commonwealth of Kentucky*, 218 U. S. 487, 492 (1910).

II.

The Circuit Court of Appeals properly affirmed the judgment of the trial court because no one is entitled to recover damages under the antitrust laws unless he has sustained a pecuniary loss in business or property. This is a well settled rule.

The decision in the present case that a jobber is not entitled to recover the amount of an increased price *as such* is in accord with decisions of the Eighth Circuit Court of Appeals, *Twin Ports Oil Co.* v. *Pure Oil Co.*, 119 F. (2d)

747, 750, 751 (C. C. A. 8th, 1941), certiorari denied 314 U. S. 644, rehearing denied 314 U. S. 711, and various District Courts in jobber cases arising out of the Madison Oil Case. This is the rule adopted by the Supreme Court. *Keogh* v. *Chicago & Northwestern Railway Company, et al.*, 260 U. S. 156, 164-165 (1922).

Where, as here, and as charged in the Madison Oil Case, the conspiracy has raised the whole market structure, the jobber or middleman has not sustained any loss. Under petitioner's claim that any person who has paid an increased price may recover, the Barber Company, the petitioner, the subjobber, the dealer and the consumer, each would be entitled to recover three times the amount of the original increase upon the same gallon of gasoline.

The freight rate overcharge cases, relied upon by petitioner, are not applicable because such cases hold that under the Interstate Commerce Act there can be a recovery of an overcharge without proof of pecuniary loss and the only one who can recover is the one in privity with the carrier. This Court has held that such cases are not applicable to an action for damages under the antitrust laws. *Keogh* v. *Chicago & Northwestern Railway Company, et al.*, 260 U. S. 156, 164-165 (1922). The decision in *Straus, et al.* v. *Victor Talking Mach. Co., et al.*, 297 F. 791 (C. C. A. 2d, 1924) does not conflict with the decision in the present case, because in that case Straus sustained a pecuniary loss which was measured exactly by the increase in the purchase price to him. Moreover, here the conspiracy has raised both the buying and selling prices of petitioner. Since petitioner has based its case upon the Madison Oil Case, it must accept the conspiracy and its total effect as charged in that case and found to exist here, which was the raising of both the tank car and retail prices of gasoline.

III.

Petitioner failed to prove any loss in business or property and the only reasonable inference from the evidence, which establishes that there were corresponding increases in petitioner's buying and selling prices as a result of the conspiracy, is that petitioner sustained no loss.

IV.

The claim of petitioner that there was a conspiracy to limit the jobber's margins and to reduce or limit the retail price is raised for the first time in the Supreme Court and is without support in the pleadings or evidence.

V.

The undisputed evidence establishes that petitioner is in *pari delicto* with respondents and as the finding of fact of the Circuit Court of Appeals on this point has not been brought forward by any question in the petition for writ of certiorari, such finding is binding on this Court. Where parties are in *pari delicto*, the law leaves them where it finds them.

ARGUMENT.

I.

This Court Should Not Grant the Petition for Writ of Certiorari Because It Would Be Necessary, in Any Event, to Affirm the Judgment of the Lower Court as the Petitioner Has Failed to Bring Forward One of the Two Grounds Upon Which the Circuit Court of Appeals Based Its Decision.

Respondents urged to the Circuit Court of Appeals that the directed verdict should be sustained upon the *pari delicto* ground as well as upon the ground that the petitioner had proved no damage in its business or property. The Circuit Court of Appeals found as a fact that the petitioner had been a participant in the conspiracy and held that:

> "Having participated in this illegal undertaking, plaintiff may not recover; where parties stand in *pari delicto*, the law leaves them where it finds them * * *." (R. 1358.)

The Court held that this was a sufficient ground to support the judgment for respondents.

The Petition for Writ of Certiorari does not question the correctness of, and in fact does not even mention, the decision of the Circuit Court of Appeals that a verdict was properly directed for the respondents on the ground that the petitioner was in *pari delicto*. Not having brought this question forward, it is not before this Court. *Rule 38, Supreme Court Rules; Gunning* v. *Cooley*, 281 U. S. 90, 98 (1930); *Helvering, Commissioner of Internal Revenue* v. *Taylor*, 293 U. S. 507, 511 (1935); *General Talking Pictures Corp.* v. *Western Electric Co., et al.*, 304 U. S. 175, 177-178 (1938). Therefore, this holding of the Circuit Court of

Appeals must be assumed to be correct, and the judgment in this case, in any event, would have to be affirmed. *The Prudence Co., Inc.* v. *Fidelity & Deposit Company of Maryland, et al.*, 297 U. S. 198, 208 (1936); *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U. S. 52, 66 (1927).

This Court will not take jurisdiction when it appears, as it does here, that the decision would have to be affirmed regardless of how this Court resolves the point raised by petitioner. *Lynch, et al.* v. *New York ex rel. Pierson*, 293 U. S. 52, 54, 55 (1934) and *Fox Film Corp.* v. *Muller*, 296 U. S. 207, 209, 210 (1935). It is the policy of this Court to decide only actual controversies by a judgment that can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the rights of the parties in the case before it. *Richardson* v. *McChesney, Secretary of State of the Commonwealth of Kentucky*, 218 U. S. 487, 492 (1910); *Mills* v. *Green*, 159 U. S. 651, 653 (1895); *Tennessee* v. *Condon*, 189 U. S. 64, 70, 71 (1903).

II.

The Circuit Court of Appeals Was Correct in Affirming the Judgment of the Trial Court Because a Person Cannot Recover Damages Under the Clayton Act Unless He Has Shown Pecuniary Loss in Business or Property as the Proximate Result of a Violation of the Antitrust Laws.

A. Personal Pecuniary Damage in Business or Property Is the Gist of an Action Under the Clayton Act.

Section 4 of the Clayton Act (15 U. S. C. A. § 15), upon which this action is based, provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the

> antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee * * *."

No one is entitled to recover under this section unless he has suffered a pecuniary loss in his business or property as a result of a violation of the antitrust law. The mere fact that respondents have been convicted in a criminal prosecution does not give petitioner a cause of action. Pecuniary loss is the gist of the action. *Keogh* v. *Chicago & Northwestern Railway Company, et al.*, 271 F. 444, 447 (C. C. A. 7th, 1921) affirmed 260 U. S. 156; *Foster & Kleiser Co.* v. *Special Site Sign Co.*, 85 F. (2d) 742, 750 (C. C. A. 9th, 1936), certiorari denied 299 U. S. 613; *Glenn Coal Co.* v. *Dickinson Fuel Co., et al.*, 72 F. (2d) 885, 887 (C. C. A. 4th, 1934); *Jack* v. *Armour & Co., et al.*, 291 F. 741, 745 (C. C. A. 8th, 1923); *Locker, et al.* v. *American Tobacco Co., et al.*, 218 F. 447, 448 (C. C. A. 2d, 1914).

B. The Decision of the Seventh Circuit Court of Appeals in the Present Case Is in Accord With Decisions in Other Jobber Treble Damage Cases Arising Out of the Madison Oil Case.

The decision in the present case by the Seventh Circuit Court of Appeals is in accord with decisions by the Eighth Circuit Court of Appeals and with decisions of various District Courts in jobber cases arising out of the Madison Oil Case. These courts have recognized that the cases relied upon by petitioner here are not applicable to a jobber action.

The first treble damage case brought against respondents, as a result of the Madison Oil Case, was a suit by a jobber reported in *Twin Ports Oil Co.* v. *Pure Oil Co.*, 119 F. (2d) 747, 750 (C. C. A. 8th, 1941), certiorari denied 314 U. S. 644, rehearing denied 314 U. S. 711. The Court held that the Clayton Act does not authorize the recovery of an

unlawfully increased price but only the recovery of damages resulting therefrom. The same cases relied upon by petitioner here were urged upon the Supreme Court in the petition for certiorari in that case.

Other jobber treble damage cases to the same effect are: *Leonard* v. *Socony-Vacuum Oil Co., Inc., et al.*, 42 F. Supp. 369, 370 (D. C., W. D. Wis., 1942); *H. E. Miller Oil Co.* v. *Socony-Vacuum Oil Co., Inc., et al.*, 37 F. Supp. 831 (D. C., E. D. Mo., E. D., 1941); *Farmers Co-op. Oil Co.* v. *Socony-Vacuum Oil Co., Inc., et al.*, 133 F. (2d) 101, 103 (C. C. A. 8th, 1942).

These decisions are in accord with the rule adopted by the Supreme Court. This Court in *Keogh* v. *Chicago & Northwestern Railway Company, et al.*, 260 U. S. 156, 164-165 (1922) held that the exaction of a higher freight rate as the result of a conspiracy did not in and of itself establish any damage under the antitrust laws to the shipper.

The contention of petitioner that the Clayton Act authorizes the recovery of the amount of an increased payment *as such*, irrespective of pecuniary damage, is not only contrary to the express wording of the Clayton Act and the decisions construing it, but would lead to most inequitable and absurd results.

Witness the course of a gallon of gasoline from producer to consumer under the facts of this case where the petitioner is the *second* jobber in the chain from producer to consumer.

The Tide Water Company, the producer, sold to the Barber Company, a jobber, at ¼¢ under the low quotation of the tank car price as published in the Chicago Journal of Commerce (Ex. 15, R. 243, 559); the Barber Company then sold the same gasoline to petitioner at an invoiced price equal to the low of the tank car price as published in the Chicago Journal of Commerce (R. 223, 254); the

petitioner then sold the same gasoline to its subjobbers at the average of the high and low quotations of the tank car prices as published in the Chicago Journal of Commerce (R. 369; Ex. 13, R. 242, 1051); or it sold such gasoline to dealers or consumers at the dealer tank wagon or service station price posted by Standard Oil Company which was based upon the tank car price as published in the Chicago Journal of Commerce (R. 160-161, 252, 387, 571). In other words, the buying price of Barber, petitioner, subjobber, dealer and consumer were all based upon the spot tank car price as published in the Chicago Journal of Commerce. As stated by the Supreme Court in *United States* v. *Socony-Vacuum Oil Co., Inc., et al.*, 310 U. S. 150 (1940):

> "• • • the spot market was a 'peg to hang the price structure on'." (p. 192)

Thus, upon any unlawful rise in the tank car price, both petitioner's buying and selling prices were increased. The same was true as to the buying and selling prices of Barber, and of petitioner's subjobber and of petitioner's dealer. Only the consumer, who is not a reseller, found himself bearing the increase in price. Where the consumer has paid the amount of an unlawful increase, he, and he alone, is the person who has sustained pecuniary loss within the meaning of the Clayton Act. He is the one injured, because his property has been diminished. In construing the similar section of the Sherman Act, Mr. Justice Holmes, in *Chattanooga Foundry and Pipe Works* v. *City of Atlanta*, 203 U. S. 390 (1906), said:

> "• • • A man is injured in his property when his property is diminished. • • •" (p. 399)

Where, as here, the conspiracy has raised the whole market structure, the jobber's or middleman's property has not been diminished.

Under petitioner's claim that any person who has paid an increased price may recover three times the amount of

that increase without proof of pecuniary loss, the Barber Company, the petitioner, the subjobber, the dealer and the consumer, each, would be entitled to recover three times the amount of the original increase upon the same gallon of gasoline. This would create a total liability upon the respondents of fifteen times the amount of the increase.

However, petitioner suggests that the consumer cannot recover because he was not in privity with respondents (Pet's. Brief, p. 14). Neither was petitioner in privity with respondents as it did not purchase gasoline from them. But, of course, privity is not essential to a recovery under the anti-trust laws and petitioner cannot deny the consumer a right of recovery on this ground.

C. There Is No Conflict Between the Cases Cited by Petitioner and the Decision of the Circuit Court of Appeals in the Present Case.

In support of its contention that it can recover the amount of the increased price as such, petitioner relies on certain freight rate cases. These freight rate cases are not applicable. The recovery of a tariff overcharge under the Interstate Commerce Act (49 U. S. C. A. § 1) differs from a recovery under the Clayton Act, in the following respects:

(1) A tariff overcharge is recoverable *as a matter of law*, without showing a pecuniary loss. *Louisville & Nashville Railroad Co.* v. *Sloss-Sheffield Steel & Iron Company*, 269 U. S. 217, 235 (1925); *New York, N. H. & H. R. Co., et al.* v. *Ballou & Wright*, 242 F. 862, 867 (C. C. A. 9th, 1917); *Doughty-McDonald Grocery Company, et al.* v. *Atchison, Topeka & Santa Fe Railway Company, et al.*, 155 I. C. C. 47 (1929).

(2) As the recovery is of the tariff overcharge *as such*, only persons in privity with the carrier are entitled to recover—thus, suit must be brought by the one who paid the overcharge and against the carrier which collected the overcharge. *Southern Pacific Com-*

pany, et al. v. *Darnell-Taenzer Lumber Company, et al.* 245 U. S. 531, 534 (1918); *Missouri Portland Cement Company* v. *Director General, as Agent*, 88 I. C. C. 492, 495, 496 (1924); *Nicola, Stone & Myers Company* v. *Louisville & Nashville Railroad Company, et al.*, 14 I. C. C. 199, 209 (1908).

(3) An action under the Clayton Act is a tort action. Such action is not for recovery of an overcharge as such, but is "for threefold the *damages* by him sustained." Recovery is not limited to persons in privity with the wrongdoer but extends to all persons who have suffered pecuniary loss as a natural and probable result of the illegal act. The amount of damages may be more or less than the amount of any increase in price.

Thus, the Interstate Commerce Act authorizes the recovery of a tariff overcharge by the one who pays it in the first instance; the Clayton Act authorizes the recovery of damages sustained.

The distinctive character of the railroad rate overcharge cases, which do not require proof of pecuniary loss, is emphasized by the fact that in suits by persons under the Interstate Commerce Act for a violation of Section 2 (unjust discrimination provision) or for a violation of Section 4 (the long-and-short-haul provision), pecuniary loss must be established. *Pennsylvania Railroad Company* v. *International Coal Mining Company*, 230 U. S. 184, 202-203, 206 (1912); *Davis* v. *Portland Seed Company*, 264 U. S. 403 (1924).

The Clayton Act is subject to the same rules of proof as announced in the *International Coal Case*, and the so-called rate reparation cases construing Section 1 of the Interstate Commerce Act are wholly inapplicable. The Supreme Court has held that the rule requiring pecuniary loss, as announced in the *International Coal Case*, is controlling in a treble damage action under the anti-trust laws,

and that the rule of *Southern Pacific Company, et al.* v. *Darnell-Taenzer Lumber Company, et al.*, 245 U. S. 531 (1918), which is relied upon by petitioner, is not applicable. In *Keogh* v. *Chicago & North Western Railway Company, et al.*, 260 U. S. 156 (1922), the Supreme Court said:

> "* * * Under § 7 of the Anti-Trust Act, as under § 8 of the Act to Regulate Commerce, *Pennsylvania R. R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, recovery cannot be had unless it is shown, that, as a result of defendants' acts, damages in some amount susceptible of expression in figures resulted. These damages must be proved by facts from which their existence is logically and legally inferable. They cannot be supplied by conjecture. To make proof of such facts would be impossible in the case before us. It is not like those cases where a shipper recovers from the carrier the amount by which its exaction exceeded the legal rate. *Southern Pacific Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531. * * *" (p. 164-165)

Thus the Seventh Circuit Court of Appeals in the present case and the Eighth Circuit Court of Appeals in *Twin Ports Oil Co.* v. *Pure Oil Co.*, 119 F. (2d) 747, 750, 751 (C. C. A. 8th, 1941), certiorari denied 314 U. S. 644, rehearing denied 314 U. S. 711, followed the rule announced by the Supreme Court in holding that the principle of the rate overcharge cases was not applicable in a suit for damages under the anti-trust laws.

Even if the rate reparation cases were applicable, petitioner cannot recover under the very rule for which it contends. Under those cases, the only one who can recover is the one who paid the increased price in the first instance, and the suit must be against the one who received the increased price in the first instance. *This petitioner is not the party who first paid the alleged increase and the respondents are not the parties to whom the alleged increase was paid.* The alleged illegal increase in the tank car price

was first paid by the W. H. Barber Company, who purchased from Tide Water.

In addition to the rate reparation cases, petitioner relies upon certain treble damage cases. A brief analysis of these cases shows that they are not in conflict with the decision in the present case and that they do not in the least depart from the long line of cases requiring pecuniary loss under the Clayton Act.

The plaintiff in *Straus, et al.* v. *Victor Talking Mach. Co., et al.*, 297 F. 791 (C. C. A. 2d, 1924), was a retailer who had been accustomed to buying Victor products at wholesale prices. Because plaintiff refused to abide by certain trade practices imposed by the Victor Company, that company refused to permit Straus to continue to buy at wholesale. His competitors continued to receive the benefit of the wholesale prices. In order to supply his customers, Straus was forced to buy Victor products on the retail market.

This case is neither applicable nor controlling here, because:

(1) Straus was forced from a wholesale to a retail market. In other words, Straus was forced to buy and sell on the retail market. *He thus suffered an actual pecuniary loss which was measured exactly by the increase in the price to him.*

(2) Only the price to Straus was raised and he was the only one injured as a result of the conspiracy. His selling price was not raised. In the present case the whole market structure has been raised as a result of the conspiracy and the consumer has borne the increase in price.

(3) The *Straus Case* was urged upon the Circuit Court of Appeals in *Twin Ports Oil Co.* v. *Pure Oil Co.*, 119 F. (2d) 747 (C. C. A. 8th, 1941). It was cited or quoted from in the plaintiff's brief no less than a dozen times. It was urged upon the Supreme Court in the petition for writ of certiorari and the petition

was denied (314 U. S. 644). In view of the many anti-trust decisions holding that pecuniary loss is essential to recovery under the anti-trust laws, statements in the *Straus Case* must be considered in the light of the facts of that case which established that a pecuniary loss had been sustained in the amount of the increase in price which was the difference between the wholesale price and the price paid by Straus.

It has already been pointed out that in *Chattanooga Foundry and Pipe Works* v. *City of Atlanta*, 203 U. S. 390, 399 (1906), the plaintiff was injured because its property was diminished. The City of Atlanta had purchased pipe for its own use in its own city water system and the pipe was not purchased for resale. Thus, the City was a consumer and it bore the illegally increased price. The City of Atlanta, therefore, actually sustained a pecuniary loss which was measured by the amount of the illegally increased price of the pipe.

The cases cited by petitioner are not controlling for a still further reason:

In the Madison Oil Case, upon which petitioner bases this case, the respondents were charged with and convicted of raising the tank car and in turn the retail price of gasoline. Thus, under the theory of that case, both petitioner's buying and selling prices were raised as a result of this conspiracy. As petitioner has based its case upon the conspiracy established in the Madison Oil Case, it cannot at its convenience take a part of this conspiracy and reject the rest. It must accept the conspiracy and its total effect, as charged in that case, which was the raising of both the tank car and retail prices of gasoline. This fact in and of itself is sufficient to distinguish this case from the cases cited by petitioner.

III.

Petitioner's Evidence Failed to Establish Any Injury in Its Business or Property.

A. Petitioner Did Not Bring Forward the Evidence in Its Possession Which Would Have Established Definitely Whether or Not the Increase in Its Purchase Price Was Passed On.

Petitioner did not sustain the burden of proof placed upon it by the statute which requires proof of injury in business or property. Although petitioner stood before the Court strictly and solely as a reseller, seeking to recover damages on only gasoline bought and resold as a jobber, it did not attempt to establish that its cost of gasoline was increased more than the increase of income resulting from the increase in the whole market structure. Petitioner offered a tabulation of its increased cost (Ex. 165, R. 913, 1301), but failed to produce any computation of increased income.

Petitioner has now set out a schedule of margins on sales to dealers in the appendix to its brief and has referred to certain average margins on Pages 20 and 21 as "the jobber's margin." These margins do not show any damage to petitioner and, furthermore, they are not petitioner's margins (R. 496-497; 667-672). Reference is made by petitioner to the fact that there was a higher average margin for the year 1934 than for the years 1935 and 1936. But, as shown by petitioner's own schedule, the reduction in margins occurred on September 11, 1934 as the result of Standard's action in reducing the service station price 2.2¢. This was several months prior to the commencement of the conspiracy for which respondents were charged with raising prices—not reducing them (Ex. 1, R. 110, 1001; R. 6). Even if petitioner had shown the margins received by it at all of its bulk plants, it, also, would have been

necessary to prove the gallonage sold to jobbers, dealers and consumers.

It would have been a simple matter for petitioner to have ascertained its increased income. It had, as a part of its records, price schedules showing the prices charged on sales from its bulk plants (see Exs. 24, 25, 26, 27 & 28 [R. 376, 1069-1073] offered by respondents); and petitioner also had sales analyses showing the gallonage sold to jobbers, dealers and consumers (R. 920). It failed to produce these price schedules or the sales analyses.

The burden was upon petitioner to prove the fact and cause of injury with certainty. *Story Parchment Company* v. *Paterson Parchment Paper Company, et al.*, 282 U. S. 555, 562 (1931); *Palmer, et al.* v. *Connecticut Railway & Lighting Co.* 311 U. S. 544, 561 (1941); and its failure to produce the evidence in its possession raises a presumption that such evidence would have been adverse to it. *Joseph Galloway by Freda Galloway, his Guardian, Petitioner* v. *The United States of America,* 319 U. S. 372 (1943); *Interstate Circuit, Inc., et al.* v. *United States,* 306 U. S. 208, 226 (1939); *Shuell, et al.* v. *London Amusement Co.,* 123 F. (2d) 302, 306 (C. C. A. 6th, 1941).

B. The Only Reasonable Inference Which Can Be Drawn from the Evidence Is That Petitioner Sustained No Injury.

We have set out in this brief the different increases in the tank car and retail markets during 1935 and 1936 (Brief, p. 5), and it appears that the increases in the tank car market were followed by corresponding increases in the retail market. Furthermore, the Barber Company guaranteed petitioner a gross margin of profit of 5½¢ and subsequently 5¾¢ per gallon, between the tank car price plus freight and the normal service station price as posted by the Standard Oil Company of Indiana less taxes (Ex. 15, R. 243, 560, 563-564).

If petitioner paid an increased amount of $156,000.00 for gasoline as stated by it, it is clear that it received at least this additional amount as the result of the increase in the whole market structure, and undoubtedly it received more as a result of buying and selling on a rising market. Therefore, the only reasonable inference which can be drawn from this evidence is that petitioner did not sustain any injury in its business or property.

IV.

The Claim of Petitioner That Respondents Fixed and Limited Its Margin, and Fixed, Reduced and Limited the Retail Price Is Raised for the First Time in the Supreme Court and Is Without Support in the Pleadings or Evidence.

Petitioner asserts that the contention of respondents and the statements by the Supreme Court in *United States* v. *Socony-Vacuum Oil Co., Inc., et al.*, 310 U. S. 150 (1940), that the buying and selling prices of the jobber were increased, prove the fact of damage to it. The fact is that just the contrary is established. Comparable increases in both the buying and selling prices of the jobber establish that he received no injury.

Petitioner refers to the margin schedule in the appendix to its brief (which does not represent its margins) to show that the jobber's margins were reduced and did not exceed approximately 2¢ per gallon in 1935 and 1936.[2] Petitioner points out that Standard reduced the retail price on

2. Commencing on September 11, 1934 and continuing through 1935 and 1936 Standard's retail price was determined by computing the tank car market and adding freight, taxes and 5½c. This 5½c was the equivalent of a 2c jobber margin and a 3½c service station margin (R. 160-161, 203-204, 214). *United States* v. *Socony-Vacuum Oil Co., Inc., et al.*, 310 U. S. 150, 192.

September 11, 1934, 2.2¢ "cutting the jobber's margin from .03773¢ to .01573¢ per gallon" (Pet's. Brief, p. 19). Petitioner suggests that this was the result of a conspiracy between Standard and respondents, and concludes that respondents have limited the jobber's margin by fixing both the buying and selling prices of the jobber. This point is made for the first time in the Supreme Court and is without support in the pleadings or evidence in the trial court or in the statement of points in the Circuit Court of Appeals. The Government charged in the Madison Oil Case and petitioner alleged in this case that respondents entered into a conspiracy to raise prices (not to reduce them), and that such conspiracy began in February 1935 (not on September 11, 1934) (Ex. 1, R. 110, 1001; R. 6).

Petitioner recognizes that this was not an issue in the trial court by the following statement in its brief:

> "Respondents cannot complain that this theory is not now more specifically set out in the pleadings nor insisted upon in the trial." (Pet's. Brief, p. 21)

Not only was it not set out in the pleadings or insisted upon in the trial, but it was expressly disclaimed by petitioner as being an issue in the case. In a colloquy between counsel reference was made to the action of Standard on September 11, 1934 in reducing retail prices as not being an issue in this lawsuit, and Mr. Crawford, counsel for petitioner, stated:

> "• • • We are not claiming here any damage on account of what the Standard Oil Company did in 1934. I am sure counsel understands that." (R. 256)

V.

Petitioner Cannot Maintain This Action Against Respondents, Because Both Petitioner and Respondents Were Participants in a Broad Stabilization Program to Raise Prices in Petroleum Markets, and Such Stabilization Program Was Found to Be Illegal in United States v. Socony-Vacuum Oil Co., Inc., et al., 310 U. S. 150 (1940).

There was no issue of fact for the jury on this question because it was established in the trial court by undisputed evidence. The necessary and controlling facts to establish this defense appear in the record from the following three sources:

(a) Letters written by A. F. Podvin, Vice President and General Manager of petitioner;

(b) Testimony of officers of the petitioner; and

(c) The judgment in the Madison Oil Case which was offered by the petitioner as *prima facie* evidence under Section 5 of the Clayton Act.

We have heretofore set out briefly the evidence of petitioner's activities in participating in this stabilization program (Brief, pp. 7-9). The record is replete with letters and testimony of petitioner's officers which establish that it was an active agency in working with respondents and others to carry out the stabilization program and to maintain prices during 1934, 1935 and 1936 (R. 463, 488-489, 433-434, 445-446, 457-458; Exs. 67-106, R. 413, 414, 418, 419, 421, 427, 438, 448, 458, 466, 474, 412-481; Exs. 107-142, R. 484, 577, 578, 589, 485-486, 1218-1248).

The Circuit Court of Appeals has found as a fact that petitioner participated in the illegal conspiracy and was in *pari delicto* with respondents (R. 1355, 1358). As this finding has not been brought forward by any question in the petition for writ of certiorari, this Court, of course,

must assume such finding to be correct, *Rule 38, Supreme Court Rules.*

It is firmly established that a court will not aid a party to recover on a cause of action that is founded on a wrong in which the party took part. *Harriman* v. *Northern Securities Company,* 197 U. S. 244, 298 (1905). This is a well settled rule in treble damage actions under the anti-trust laws. *Eastman Kodak Co.* v. *Blackmore,* 277 F. 694 (C. C. A. 2d, 1921); *Victor Talking Mach. Co.* v. *Kemeny,* 271 F. 810, 816 (C. C. A. 3rd, 1921); *Bluefields S. S. Co., Limited* v. *United Fruit Co.,* 243 F. 1, 13-14, 18-19 (C. C. A. 3rd, 1917); *Maltz* v. *Sax, et al.,* 134 F. (2d) 2, 5 (C. C. A. 7th, 1943).

WHEREFORE, the petition for writ of certiorari should be denied.

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